BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NANCY J. MOSSER	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,009,353
AMARR GARAGE DOOR GROUP	)	& 1,011,043
Respondent	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE (a/k/a AIG)	)	
and PENNSYLVANIA MANUFACTURER'S	)	
ASSOCIATION INSURANCE GROUP	)	
Insurance Carriers	)	

ORDER

Respondent and it insurance carrier American Home Assurance (a/k/a AIG) (hereinafter AIG) appeal the October 25, 2005 Award of Administrative Law Judge Brad E. Avery. Claimant was awarded benefits for a 20 percent permanent partial impairment to the body as a whole on a functional basis for injuries occurring on April 1, 2001, after the Administrative Law Judge (ALJ) determined that claimant had failed to put forth a good faith effort to return to work with respondent after an offer of an accommodated, comparable-wage employment was made. Respondent and AIG respectfully dispute the ALJ's determination that all of claimant's problems stem from the April 1, 2001 alleged date of accident, contending instead that claimant suffered additional injuries after remaining employed with respondent through January 13, 2004.

Respondent and its insurance carrier Pennsylvania Manufacturer's Association Insurance Group (hereinafter Pennsylvania) argue that claimant should either receive an award for two separate scheduled injuries or, if a general body disability is awarded, should receive an award for a 20 percent impairment to the body as a whole on a functional basis.

Claimant argues that she is entitled to work disability under K.S.A. 44-510e, for an accident occurring on April 1, 2003 [sic], arguing that respondent's offer of employment was not made in good faith. Claimant alleges the offers were for nighttime employment,

which violated claimant's restriction against driving after dark. The Appeals Board (Board) heard oral argument on February 7, 2006.

APPEARANCES

Claimant appeared by her attorney, Chris Miller of Lawrence, Kansas. Respondent and its insurance carrier (AIG) appeared by their attorney, Matthew S. Crowley of Topeka, Kansas. Respondent and its insurance carrier Pennsylvania Manufacturer's Association Insurance Group (hereinafter Pennsylvania) appeared by their attorney, Eric T. Lanham of Kansas City, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award. Additionally, the parties agreed at oral argument that Edward J. Prostic, M.D., board certified orthopedic surgeon, provided an opinion, assessing claimant a 25 percent impairment to the right upper extremity and 20 percent impairment to the left upper extremity, which, under the fourth edition of the AMA *Guides*,[1] combine to a 25 percent whole person impairment. This clarifies the inconsistency between Dr. Prostic's testimony and Dr. Prostic's written report. Additionally, the parties agreed that if claimant's date of accident is April 1, 2001, the $424.15 average weekly wage would be appropriate. If, however, claimant's date of accident was deemed to be her last day worked on January 13, 2004, then claimant was being paid $10.98 per hour and working a 40-hour week, for a $439.20 wage.

ISSUES

1. What is the appropriate date or dates of accident suffered by claimant while employed with respondent?

2. What is the appropriate average weekly wage?

3. What is the nature and extent of claimant's injuries and disabilities? More particularly, did claimant suffer two scheduled injuries or is she entitled to a permanent partial general work disability under K.S.A. 44-510e?

4. If claimant is entitled to a permanent partial general work disability, did she make a good faith effort to retain and/or obtain employment after her injuries with respondent? If claimant failed to make a good

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

> faith effort to retain and/or obtain employment after her injuries with respondent, what, if any, wage should be imputed to claimant pursuant to K.S.A. 44-510e?

At oral argument, claimant's attorney withdrew his request for temporary total disability compensation for the period November 23, 2003, through January 14, 2004. Additionally, the parties agreed that while the ALJ awarded claimant future medical care upon application and review, and unauthorized medical care up to the applicable statutory limit, those issues were withdrawn by the parties and, therefore, need not be determined by the Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant, a sample worker for respondent, was carrying a 20-foot piece of garage door on or about April 1, 2001, when a co-worker she was carrying the door with dropped her end of the door. The resulting jar caused claimant immediate pain in her upper extremities. Claimant testified that the pain was present for a while and then it went away. This same type of incident occurred one and a half to two months later, with claimant suffering similar symptoms. The exact date of the second incident is not contained in this record. Claimant has filed two E-1s (applications for hearing) in this matter. The first alleges accidental injury on April 1, 2001, and each and every day worked since. The second E-1 filed alleges accidental injury on or about July 1, 2002, and each and every day worked since.

Approximately six months after the incidents,[2] claimant began experiencing problems with her wrists, hands and arms, including burning and numbness. Claimant testified she was also experiencing discoloration, with her hands turning purple. Claimant began experiencing weakness in her hands, and her hands began giving way.

Claimant was referred to Dr. Michael Geist in May of 2002. Dr. Geist placed her on light duty and referred her to Dr. Neal Lintecum, a specialist. Nerve conduction studies were performed, and Dr. Lintecum performed surgery on claimant's right arm on July 22, 2002, performing a right carpal tunnel release endoscopically. Claimant was returned to work, light duty, in September of 2002. When claimant returned to work, she worked light duty for a time and then returned to full duty, going back to working samples.

---

[2] Whether the six months begins after the April 1, 2001 incident or after the incident occurring one and a half to two months later is unclear from this record. (See P.H. Trans. (July 15, 2003) at 8-9 and 19-21.)

Claimant began experiencing additional difficulties and was ultimately referred by claimant's attorney to board certified hand specialist and plastic surgeon Lynn D. Ketchum, M.D., who first saw claimant on April 17, 2003, for an evaluation. Dr. Ketchum eventually became the treating physician. After diagnosing bilateral carpal tunnel syndrome, he performed a carpal tunnel release on claimant's left wrist on October 20, 2003. On October 4, 2004, he performed a repeat carpal tunnel release on the right wrist with a neurolysis of the median nerve. He last examined claimant on January 31, 2005, at which time he released her to return to regular work.

Dr. Ketchum acknowledged claimant experienced a traumatic injury on April 1, 2001, but also testified that in his opinion, claimant's return to work was the cause of the worsening of her right carpal tunnel symptoms and the basis for his recommendations for injections and the ultimate need for surgeries bilaterally. He testified that when he returned claimant to light-duty work after the October 20, 2003 surgery on her left wrist, she was instead put back to regular duty which, in his opinion, also irritated her left wrist.

Dr. Ketchum was provided a job task list created by vocational expert Michael Dreiling. In Dr. Ketchum's opinion, claimant was able to perform all of the tasks on the list, resulting in a zero percent task loss.[3]

Claimant was referred by her attorney to Dr. Prostic for an examination on January 17, 2005. Dr. Prostic diagnosed bilateral carpal tunnel syndrome which, in his opinion, was caused or contributed to by the work performed by claimant while employed with respondent. Dr. Prostic assessed claimant a 25 percent impairment of the right upper extremity and a 20 percent impairment of the left upper extremity, for a combined impairment of 25 percent to the body pursuant to the fourth edition of the AMA *Guides*.[4] Dr. Prostic reviewed Mr. Dreiling's task list. In his opinion, claimant had lost the ability to perform 50 percent of the tasks on that list.

Claimant was also referred to Michael J. Poppa, D.O., board certified by the American Osteopathic Board of Preventive Medicine, for an evaluation on June 28, 2005, at the request of the attorney for respondent and one of its insurance carriers (Pennsylvania). Dr. Poppa found claimant to be at maximum medical improvement concerning her post endoscopic and open carpal tunnel releases. He found claimant's difficulties to be a direct and proximal result of claimant's employment with respondent. Dr. Poppa assessed claimant a 15 percent impairment to the right upper extremity and a 10 percent impairment to the left upper extremity, for a 15 percent permanent partial

---

[3] K.S.A. 44-510e.

[4] AMA *Guides* (4th ed.).

impairment to the body as a whole based upon the fourth edition of the AMA *Guides*.[5] He also felt claimant was capable of returning to work and performing the previous duties performed at respondent. He testified that in his opinion, the injury of April 1, 2001, was the initial cause precipitating claimant's difficulties. He stated that it was possible that repetitive activities could be the root cause of the carpal tunnel syndrome, but also stated that the April 1, 2001 event caused claimant's symptoms to begin, with the later difficulties being a natural progression of the median neuropathy or neuritis caused by claimant's work duties. He testified that claimant's condition would have worsened even if she were not working, although he acknowledged that the fact that claimant was working caused the complaints to solidify.

Dr. Poppa explained that after a traumatic incident such as occurred on April 1, 2001, the nerve is injured. There is then a natural progression of the condition as the median nerve slowly and progressively becomes more impaired. He thought the April 1, 2001 incident caused enough trauma to irritate the median nerve. Then the condition, based on the physical structure of the carpal canal, simply continued to deteriorate and worsen.

Claimant's last day worked was January 13, 2004. Claimant applied for and received unemployment for a period of time and began looking for work with another employer. Claimant talked to respondent on three occasions about returning to work and acknowledged that respondent offered her a job on three separate occasions. However, the jobs offered to claimant were on second and third shifts, which required that claimant drive at night. Claimant advised respondent that she was unable to drive at night. Craig Crane, respondent's training and safety manager, acknowledged that they offered work to claimant on several occasions. He also agreed that claimant advised she was unable to perform those jobs, first, because she had no one to take care of her dog, and, second, because of the driving issues. Apparently, job offers were made on both the second shift (which runs from 3:30 p.m. to 11:30 p.m.) and third shift (which runs from 11:30 p.m. to 7:30 a.m.). At the time of the initial offers, the Department of Motor Vehicles had provided no restrictions on claimant's license with regard to night driving. Additionally, Mr. Crane testified that claimant was originally working first shift for respondent, which would have started at 7:00 a.m. He testified this would have required that claimant drive to respondent's facility in the dark for several months out of the year. But Kirsten Krug, respondent's human resource manager, testified that claimant worked on first shift, stating that claimant worked 7:30 a.m. to 3:30 p.m.[6]

---

[5] AMA *Guides* (4th ed.).

[6] Krug Depo. at 50.

Claimant was advised on several occasions that respondent had accommodated jobs, which would have paid her a comparable wage, available on second and third shifts. The restriction against driving at night was not provided to respondent until February 23, 2005, nearly a month after the initial offer of employment by respondent and thirteen months after claimant's termination of employment with respondent.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[7]

The Board must first determine the appropriate date or dates of accident in this case. Claimant suffered a traumatic incident on April 1, 2001, which, according to the testimony of the health care providers, caused claimant specific traumatic injury to her median nerves, resulting ultimately in bilateral carpal tunnel surgeries. However, the record also contains information that after claimant suffered these injuries, she continued to work her regular employment with respondent and this continued employment caused claimant to suffer a worsening of her condition due to the daily traumatic insult.

Injury or personal injury has been defined to mean,

> . . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.[8]

The Board finds that claimant did suffer a specific traumatic injury on April 1, 2001, which caused damage to claimant's upper extremities. However, the damage to claimant's body was not limited to the single traumatic incident of April 1, 2001. Claimant continued with respondent, performing both light duty and her regular duties, for a substantial period of time, with additional insult occurring on a daily basis. When dealing with a series of injuries which occur microscopically over a period of time, the Kansas appellate courts have established a bright line rule for identifying the date of injury in a repetitive, microtrauma situation, such as carpal tunnel syndrome. The date of injury for repetitive injuries in Kansas has been determined to be either the last day worked or the last day before the claimant's job is substantially changed.[9] In this instance, the Board finds that claimant has suffered more than one accidental injury and, therefore, determines claimant's date of accident to initially have been April 1, 2001, after which claimant suffered

---

[7] K.S.A. 44-501 and K.S.A. 44-508(g).

[8] K.S.A. 44-508(e).

[9] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

a series of accidental microtrauma injuries through her last day worked with respondent on January 13, 2004.

The Board must next determine the appropriate average weekly wage for these dates of accident. The parties acknowledged at oral argument that on April 1, 2001, claimant had an average weekly wage of $424.15 based upon a $10-per-hour wage, a 40-hour work week and $24.15 in overtime. The Board adopts that finding for the purposes of this Award.

At oral argument, the parties acknowledged that claimant was making $10.98 per hour and working 40 hours per week on the last day worked. This results in an average weekly wage of $439.20. Overtime and fringe benefit information is not contained in this record and, therefore, the Board will not include those numbers into this average weekly wage. The Board finds that as of April 1, 2001, claimant had an average weekly wage of $424.15. As of January 13, 2004, claimant's average weekly wage was $439.20.

With regard to the nature and extent of claimant's injury, the Board must first consider what functional impairment claimant has suffered for both the single traumatic accident on April 1, 2001, and the series of microtraumas through January 13, 2004.

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[10]

Here, the Board has two functional impairments to consider. Dr. Prostic assessed claimant a 25 percent impairment to the body as a whole based upon a 25 percent impairment to the right upper extremity and a 20 percent impairment to the left upper extremity, with his opinion being determined pursuant to the fourth edition of the AMA *Guides.*[11] Dr. Prostic, however, did not see claimant until January 17, 2005, well after the dates of accident in this matter. Claimant was also examined by Dr. Poppa, who provided claimant an impairment consisting of a 15 percent impairment of the right upper extremity and a 10 percent impairment of the left upper extremity also pursuant to the fourth edition of the AMA *Guides.*[12] These combine to a 15 percent whole body permanent disability on a functional basis. Dr. Poppa's opinion also was determined well after claimant's dates of accident, having not seen claimant until June 28, 2005. There is a dispute between the

---

[10] K.S.A. 44-510e(a).

[11] AMA *Guides* (4th ed.).

[12] AMA *Guides* (4th ed.).

doctors regarding when claimant's injuries actually occurred, with the Board determining that claimant has suffered more than one accident. But neither physician rated claimant on a functional basis as a result of the injuries of April 1, 2001. Without specific proof of the extent of claimant's permanent injury for that accident, the Board finds claimant has failed in her burden of proof and assesses claimant no functional impairment for that date of accident.

However, both Dr. Poppa and Dr. Prostic have provided medical opinions regarding claimant's functional impairment as of her last date of employment with respondent. The Board finds, as did the ALJ, that neither doctor's opinion is entitled to greater weight than the other. The Board, therefore, finds claimant has suffered a 20 percent whole person functional impairment for the injuries suffered through January 13, 2004. The Board acknowledges that when dealing with multiple accidents over extended periods of time, the possibilities of either a reduction in the functional impairment for an aggravation of a preexisting condition under K.S.A. 44-501(c) or a reduction in compensation for prior compensable permanent injuries under K.S.A. 44-510a exist in the Kansas Workers Compensation Act. However, as the extent of any permanency suffered by claimant prior to her last day worked is not proven in this record, neither a preexisting credit nor reduction is possible in this instance.[13]

The Board acknowledges that respondent was insured by two separate insurance companies for these dates of accident. Any permanent impairment assessed on the April 1, 2001 date would be the responsibility of the insurance carrier providing coverage on that date. Any permanent injury suffered on January 13, 2004 would be the responsibility of the insurance carrier providing coverage on that date. With regard to claimant's entitlement to medical care, the Board finds that for all the medical treatment provided to claimant and the temporary total disability compensation paid or payable to claimant through June 30, 2002, the responsibility for payment shall be assessed against respondent and its insurance company AIG. Any expenses for medical treatment provided claimant after June 30, 2002, and all temporary total disability compensation paid or payable to claimant beginning July 1, 2002, shall be assessed against respondent and its insurance company Pennsylvania.[14]

Claimant alleges entitlement to additional permanent partial general work disability under K.S.A. 44-510e.

---

[13] Although the ALJ interpreted Dr. Poppa's opinion regarding impairment to constitute a single April 1, 2001 date of accident, and all subsequent worsening to be a direct and natural consequence of that single date of accident, the Board disagrees. The Board considers the worsening after April 1, 2001 to be a new series of accidents.

[14] AIG's coverage ended June 30, 2002. Pennsylvania's coverage began July 1, 2002.

The extent of permanent partial general disability is defined as,

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.[15]

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*[16] and *Copeland.*[17] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[18]

In this instance, respondent offered claimant employment on three separate occasions. It is acknowledged that the offers of employment were on second and third shifts, which claimant argues violated the restrictions against her driving at night. The Board has concern with claimant's argument. First, the specific restriction placed upon claimant's night driving did not occur until after the offers of employment by respondent. Additionally, as noted by respondent's representative, Kirsten Krug, when claimant was working for respondent, performing job duties on the day shift, she was required to come

---

[15] K.S.A. 44-510e(a).

[16] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[17] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[18] *Id*. at 320.

to work at 7:30 a.m.[19] This would necessitate that claimant would drive to work in the dark for several months out of each year. Claimant argued that driving in the morning did not cause her difficulties, even though it was dark, because claimant was well rested at that time. This argument fails. The Board sees no medical indication in this record that claimant's nighttime driving restrictions were limited only to driving at night after work, rather than early in the morning before work. The Board, therefore, finds, pursuant to *Foulk* and *Copeland*, that claimant has failed to prove that she put forth a good faith effort to retain employment with respondent. The job offers by respondent appear to have been made in good faith and would have paid claimant a comparable wage. The Board will, therefore, impute to claimant the wage claimant would have earned had she accepted the job offers with respondent, thereby limiting claimant to her functional impairment pursuant to K.S.A. 44-510e.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated October 25, 2005, should be, and is hereby, modified to award claimant a 20 percent impairment to the body as a whole on a functional basis for the injuries suffered through January 13, 2004, and based upon an average weekly wage of $439.20 and a compensation rate of $292.81, with this portion of the award to be assessed against respondent and its insurance carrier Pennsylvania Manufacturer's Association Insurance Group.

The insurance companies American Home Assurance (a/k/a AIG) and Pennsylvania Manufacturer's Association Insurance Group will be responsible for the costs of the temporary total disability compensation and the cost of all medical care provided claimant for the injuries suffered while employed with respondent, during the periods of their respective coverage as ordered above.

Claimant is entitled to 75.48 weeks of temporary total disability compensation at the rate of $282.78 per week totaling $21,344.23, followed thereafter by 70.9 weeks of permanent partial general disability compensation at the rate of $292.81 per week totaling $20,760.23, for a total award of $42,104.46, all of which is due and owing and ordered paid in one lump sum minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

---

[19] See this Order at 5.

IT IS SO ORDERED.

Dated this ____ day of March, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Miller, Attorney for Claimant
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier (AIG)
Eric T. Lanham, Attorney for Respondent and its Insurance Carrier (Pennsylvania)
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director